NO. PD-1292-19

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS
AUSTIN, TEXAS

FREDERICK L. BROWN

APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE

APPELLANT'S BRIEF ON THE MERITS

NO. 06-19-00082-CR
COURT OF APPEALS
FOR THE SIXTH DISTRICT OF TEXAS
AT TEXARKANA

On appeal from Cause Number 47,806-A
in the 188th District Court of Gregg County, Texas
Honorable Scott Novy, Judge Presiding

Vincent Christopher Botto: 300 North Green St. Suite 315 Longview, TX 75601

ATTORNEY FOR APPELLANT

IDENTITY OF PARTIES AND COUNSEL

Appellant certifies that the following is a complete list of all parties to the trial court's judgment and the names and addresses of their trial and appellate counsel.

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES, FREDERICK L. BROWN Appellant in this cause, by and through his attorney of record, Vincent Christopher Botto, and, pursuant to the provisions of TEX.R.APP.PRO 74 and 200 et seq., files this Brief on the Merits, and would show the Court as follows:

STATEMENT OF THE CASE

Appellant was charged by indictment in two counts. Count I alleged Assault Family Violence by impeding breath or blood. Included in the indictment was a jurisdictional prior for Assault Family Violence, increasing the punishment range from 2 to 10 years to 2 to 20 years in prison. CR-4. Count II alleged Assault Family Violence. The indictment included the same jurisdictional prior referenced above increasing the punishment range from up to 1 year in the county jail to 2 to 10 years in prison. CR-5. On April 17, 2019 Appellant was found guilty of both counts by a jury and assessed 5- and 10-years imprisonment respectively. See CR-51-52 and 59-60. Appellant timely perfected his appeal on April 18, 2019.

STATEMENT OF THE PROCEDURAL HISTORY

Appellant's appellate brief, which raised four points of error, was filed in the Court of Appeals on October 3, 2019. The conviction was affirmed in an opinion not designated for publication. *Brown v. The State of Texas*, No. 6-19-00082-CR (Tex. App.-Texarkana delivered November 27, 2019) (not designated for publication). Appellant's Petition for Discretionary Review was granted on March 11, 2020. This Brief is due on April 9, 2020 and is therefore timely filed.

FACTUAL SUMMARY

A detailed rendition of the facts may be found at pp 3-10 of Appellant's appellate brief.

Facts relevant to this petition are detailed below.

On June 25, 2018 Marco Gomez called 911 after he heard what he described as people fighting and what he thought was a slap. 3 RR 55-59. Officers responded to 1704 Hutchings and heard what sounded like glass being swept. 3 RR 62-63. Appellant stated to Officer Delgado he and his girlfriend were just getting into it. 3 RR 64. Officer Delgado separated the male and female identifying her as Lorie Hutzleman. 3 RR 65-70. It was at that time Hutzleman described being punched, choked and hit with a broom. 3 RR 65-69. The State of Texas, over objection, presented Hutzleman's out of court statements to the jury. Hutzleman did not testify.

Although served with a subpoena on April 12, 2019 Hutzleman did not appear for the guilt-innocence phase of trial. See 3-RR-14. On April 8, 2019 District Attorney Investigator, Hall Reavis, attempted to serve Hutzleman at her last known address. Appellant answered the door and informed Reavis he did not know where Hutzleman was and that she had family in Ohio. 3-RR-13. On April 12, 2019 Reavis successfully served Hutzleman with a subpoena, although she did shut the door on him during service. 3-RR-13. Reavis testified there was neither an indication that Hutzleman had been threatened concerning her appearance at trial or told not to appear by Appellant, nor did Appellant interfere with service of the subpoena to Hutzleman. 3-RR-18.

The trial court received into evidence three screenshots from a Facebook profile purporting to be Hutzleman's. 3-RR-16-17, 5-RR-6-11. The screenshots contained a photograph of Hutzleman and Appellant together (Hutzleman's Facebook profile picture). The other screen shots, posted approximately one week prior to Reavis attempting to serve Hutzlman a subpoena, show what appear to be a black male. It is difficult to determine if the male in the photographs is Appellant. 3-RR-16-17. It is impossible to know when the photograph depicting

Hutzlman and Appellant together was taken, who posted the photograph or from what location the photograph was posted.

The trial court took judicial notice of a prior assault family violence conviction concerning Appellant and Hutzleman. 3-RR-18. Reavis testified there was no evidence indicating Appellant and Hutzleman were at the house together or interacted with one another in any way. 3-RR-19. After serving Hutzleman with the subpoena no further action was taken by the State of Texas to procure her appearance at trial.

SUMMARY OF ARGUMENT

The Forfeiture by Wrongdoing Doctrine was inappropriately invoked at Appellant's trial because there was no evidence linking Appellant's wrongdoing to the witness's absence. In fact, there was no evidence that Appellant acted wrongfully toward the witness in any way. By invoking the Forfeiture by Wrongdoing Doctrine and allowing all the witness's out of court statements to come in through officer testimony and body camera footage, Appellant's Sixth Amendment right to confront his accuser was violated.

Compounding the issue is the fact that the State of Texas served Hutzleman a subpoena four days prior to the start of trial on the merits yet did nothing to procure her appearance. The record is silent on the actions taken by the State after subpoena service was complete to secure Hutzleman's presence to testify. Due to the lack of effort by the State of Texas to procure Hutzleman's appearance after serving her with a subpoena, she was inappropriately deemed "unavailable" and therefore the Forfeiture by Wrongdoing Doctrine was wrongly invoked violating Appellant's Sixth Amendment constitutional right to confront his accuser.

GROUND FOR REVIEW ONE RESTATED:

THE COURT OF APPEALS ERRED WHEN IT HELD APPELLANT'S ACTIONS INVOKED THE FORFEITURE BY WRONGDOING DOCTRINE IN VIOLATION OF THE SIXTH AMENDMENT'S RIGHT TO CONFRONT ONE'S ACCUSER; IS NOT KNOWING THE LOCATION OF A WITNESS WRONGDOING, ESPECIALLY IF THE STATE WAS ABLE TO SERVE THE WITNESS WITH A SUBPOENA AFTER SAID ACTION?

ARGUMENTS AND AUTHORITIES UNDER GROUND ONE

"In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. Const. amend. VI. To overcome the requirement of confrontation when dealing with testimonial statements the Sixth Amendment demands witness unavailability and a prior opportunity to conduct a cross examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Statements to police intended to explain or prove past acts when there is no ongoing emergency qualify as testimonial. *Ohio v. Clark*, 135 U.S. 2173, 2180 (2015), citing *Hammon v. Indiana*, 547 U.S. 813, 822 (2006). A statement is deemed testimonial "when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Fratta v. State*, No. AP-76,188, at *6 (Tex. Crim. App. Oct. 5, 2011) citing *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008). The formalities of a Crawford-like interrogation are not determinant in whether a statement is testimonial. *Davis v. Washington*, 547, U.S. 813, 830 (2006). When a declarant is separated from the criminal defendant and makes the statements in response to police questioning about events that happened in the past with no immediate threat or emergency at hand, those statements are an obvious substitute for live testimony and are inherently testimonial. *Id.*

The centuries old Forfeiture by Wrongdoing Doctrine, codified under Texas Code of Criminal Procedure Section 38.49, exempts statements from the confrontation clause

requirement. When construing a statute effect is given to the plain language of its text unless the text is ambiguous or doing so leads to absurd results. *Franklin v. State*, 579 S.W. 3d 382, 386 (Tex. Crim. App. 2019). Every word in the statute matters and it is presumed that the entire statute is intended to be effective. *Dowthitt v. State*, 931 S.W. 2d 244, 258 (Tex. Crim. App. 1996).

Texas Code of Criminal Procedure Section 38.49(a) states:

> (a) A party to a criminal case who wrongfully procures the unavailability of a witness…
>
> (1) May not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and
>
> (2) Forfeits the party's right to object to the admissibility of evidence or statements based on the unavailability of the witness as provided by this article through forfeiture by wrongdoing.

TEX. CODE CRIM. PROC., art. 38.49(a). It is incumbent upon the State to prove by a preponderance of evidence the criminal defendant acted wrongfully and in so doing caused the witness's absence at trial. TEX. CODE CRIM. PROC., art. 38.49(c). The State must prove two things:

1. the defendant took some action to keep the witness from testifying, and

2. The witness's unavailability is linked to that action.

According to the bill's author, the reason for codifying the doctrine was to enable prosecutors to hold defendant's accountable when their own bad acts caused the witness's unavailability. *Author's/Sponsor's Statement of Intent*, S.B. 1360, Senate Research Center (Apr. 18, 2013).

Although the Sixth Amendment of the United States Constitution guarantees one's right to confront and cross examine his accuser, a criminal defendant cannot procure that witness's

absence wrongfully and later complain if competent evidence is admitted to supply the place of that which he has taken away. *Gonzalez v. State*, 195 S.W.3d 114, 117 (Tex. Crim. App 2006). The Constitution grants the privilege of confrontation unless a criminal defendant *voluntarily* keeps the witness away. [Emphasis Added] *Id.* at 118. Due to witness tampering by the mafia in the 1970's, notably the killing of potential State's witnesses, the doctrine was expanded to statements made to law enforcement to disincentivize "knocking-off" witnesses. *Id.* at 118. The doctrine did not expand to inaction of the defendant. The court's recognize domestic abuse can play a key role in Forfeiture by Wrongdoing.

Domestic violence is an increasingly difficult crime to prosecute and is an intolerable offense, which has led to the proliferation of different means to deal with offenders; one arrow that cannot be added to the State's quiver is the ability to abridge the constitutional rights of criminal defendants. *Giles v. California*, 554 U.S. 353, 376 (2008). Forfeiture by Wrongdoing may find a foothold in a domestic violence case where evidence can be shown that in addition to a past abusive relationship the defendant is now using that relationship to dissuade the victim from testifying. *See Id.* at 376-377. Without more evidence of action taken to keep a victim from testifying abuse in the past is not enough to invoke the doctrine. *Id.*

Every court to address Forfeiture by Wrongdoing has required some affirmative action by the defendant to keep the witness from testifying. Often the action taken to procure a witness's absence is murder. In *Gonzalez* the defendant shot and killed Maria Herrera during an aggravated robbery. *See Gonzalez* at 115-116. This Court opined Herrera's murder, even though the basis for the underlying crime, met the requirements to invoke Forfeiture by Wrongdoing because Appellant could easily have killed Herrera to keep her from testifying about the aggravated robbery he was committing just prior to him shooting her. *Gonzalez* at 125.

In *Giles* the defendant shot and killed the would-be victim-witness in a domestic violence case. *See Giles* at 357. Yet the court remanded the case for the lower court to determine the defendant's intent when killing the victim because the defendant's bad act must be linked the witness's absence in some way. *Giles* at 377. In *Shepherd v. State*, 489 S.W.3d 559 (Tex. App.-Texarkana 2019), the defendant killed the mother of his child during a custody exchange at a high school football game. *Shepherd* at 563-564. Like *Gonzalez*, during Shepherd's capital murder trial the court let in the victim's out of court statements concerning past abuse in under article 38.49. *Shepherd* at 576. Murder is not the only bad act used to invoke the doctrine.

Courts have also looked to abuse after the crime but prior to trial, threats in person and by letter and recorded phone calls to invoke Forfeiture by Wrongdoing. *See Garcia v. State*, No. 03-11-00403 (Tex. App.-Austin Aug. 29, 2012)(Not Designated for Publication), *McGee v. State*, No. 05-17-01445-CR (Tex. App.-Dallas May 7, 2019)(Not Designated for Publication), *Tarley v. State*, 420 S.W.3d 204 (Tex. App.-Houston 2014). In *Garcia* the defendant wrote the victim from jail telling her to drop the charges. *Garcia* at 19. During a recorded phone conversation from the jail he told her she could hurt him if she testified in court regarding their past. *Id.* Once the victim was served with a subpoena Garcia scolded her for being too available to law enforcement and instructed her to "lay low" prior to the trial. *Id.* The State coupled these threats with evidence from the victim's mother concerning past abuse detailing the victim's fear of Garcia. *Id.* at 21. The State called a crime victim's service coordinator to testify concerning her assisting the victim in relocating after the assault Garcia was on trial for. *Id.* This combined evidence supplied the court with enough information to sustain the Forfeiture by Wrongdoing Doctrine showing overt action by the defendant to keep the witness from testifying. *Id.* at 23. In *McGee* the defendant wrote a letter instructing the witness that she "CANNOT SHOW UP" at

his trial. *McGee* at 14. This letter along with evidence of a prior family-violence dismissal due to the State's inability to serve the victim (the victim being the same witness who was told not to show up) was sufficient to invoke the doctrine. *Id.* at 15. In *Tarley* the defendant kidnapped the victim, secreted her for two weeks in an apartment and continued to assault her to keep her from speaking to law enforcement about the prior assault he was to be tried for. *Tarley* at 205. The courts relied on clear action taken by the defendant to keep a witness from testifying before invoking the doctrine.

The State of Texas and trial court relied heavily on *Schindler v. State*, No. 02-17-00241-CR (Tex. App.-Ft. Worth [2nd District] Oct. 11, 2018)(Not Designated for Publication). In *Schindler* the victim wrote on a preprinted form that was later read to the jury: "Appellant had been violent towards her in the past, Appellant had access to firearms or weapons, Appellant had threatened to kill her, Appellant had threatened to kill himself, Appellant had attempted suicide, Things had recently gotten worse, more frequent, or more severe, Appellant had been abusive when drinking or using drugs, Appellant had been violent in front of others or in public, Appellant had put his hands around her neck and squeezed, Appellant had been violent towards children, Appellant had few friends and seemed emotionally dependent, Appellant seemed unusually jealous, possessive, or to consider her his property, Appellant had been violent when she had left or talked about leaving him, The police had been called regarding violence between her and Appellant, Appellant had recently lost his job or had trouble keeping a job". *Schindler* at 3-4. Subsequently in preparation for trial the District Attorney Investigator was unable to serve the victim with a subpoena because the defendant parked his truck so close to the investigator's car the investigator could not get out allowing the victim to drive away. *Id.* at 13-14. Additionally, Appellant told the investigator the victim did not want to testify, and they would

have to arrest her. *Id.* The court let in the victim's out of court statements explaining under the doctrine there was enough evidence that Appellant deterred subpoena service by his actions in conjunction with the prior family-violence history. *Id.* at 15-16. Even in *Schindler* overt action was taken by Appellant to thwart the victim's appearance at trial.

In this case the Court of Appeals expanded the Forfeiture by Wrongdoing Doctrine allowing its application when the record does not show Appellant taking any action to thwart subpoena service or the victim's appearance at trial. *Brown* at 8. This interpretation is not faithful to the plain language of art. 38.49(1), requiring proof of wrongdoing by the party objecting to the evidence and testimony being sought. The appellate court has decided an important question of state law that has yet to be determined by this Court: whether "no action" by Appellant is sufficient to meet the statutory requirement of "acting wrongfully". In reaching its ruling the appellate court has now created a conflict not only with other courts of appeal in Texas, but also with this Court's rulings and the United States Supreme Court.

The statements allowed in by the trial court are akin to those made in *Hammon*, and thus are testimonial. Officers arrived once the alleged altercation was complete. See 3-RR-64. Officer Delgado spoke to Hutzleman in the hallway while he left Appellant in the living room with Officer Wolf. 3-RR-65. The entire conversation deals in the past tense. Officer Delgado questioned Hutzleman about what happened, not what was happening. See 3-RR-65-70. It is a clear *Crawford*-like interrogation resulting in testimonial answers that could only be used to prove an alleged crime. The only questions are: 1. Was Hutzleman "unavailable" at trial, and 2. Was her absence due to some wrongful act by Appellant.

It is true the Appellant and victim, Hutzleman, have a history of domestic abuse. The trial court took judicial notice of the prior Assault Family Violence between Appellant and

Hutzleman dating back to 2014. 6-RR-30. No further evidence was provided concerning that relationship. Unlike in *Garcia*, no family members or victim coordinators were called to the stand to explain if the past relationship was one that would intimidate or dissuade Hutzleman from testifying. Unlike in *Schindler*, no form or testimony was elicited to show if Hutzleman was in fear of her life. Unlike in *McGee* there was no evidence presented showing the victim's lack of cooperation in the past. Nothing was provided to elaborate on what the prior family-violence meant to Hutzleman or how it may have affected her decision making. Instead of being able to draw reasonable inferences, the trial judge could only guess. Guessing is not permitted. Nor is prior domestic abuse alone sufficient to invoke article 38.49.

The statute and precedent are clear, the defendant must act wrongfully, and that action must be the cause of the witness's absence at trial. Investigator Reavis testified that seven days prior to April 8, 2019, his first attempt to serve Hutzleman a subpoena, he reviewed Hutzlman's Facebook profile. Reavis saw a photograph of Appellant and Hutzleman with the caption "Together We Stand Strong". There is nothing in the record indicating when this photograph was taken. Nothing to suggest when it was actually posted and nothing showing from where it was posted. 6-RR-6. The screenshot indicates neither a time or date of posting nor a location. There was no testimony or evidence provided to prove when the photograph was taken. There was no testimony or evidence provided to prove who posted the photograph or if the screenshot even came from Hutzleman's Facebook account. The appellate court relied on two other screenshots from the Facebook profile. These screenshots show a posting date of April 1, 2019. 6-RR-7-10. It is difficult if not impossible to know the identity of the person in the screenshots. More significantly, without the person who took the photograph or video the screenshot came from, no one can know when the image was created. In the age of digital storage and social

media, photographs and videos can be stored for long periods of time prior to being posted. Stating the image was created the day it was posted with only the screenshot available is not a reasonable inference, it is a guess. The appellate court tied these three screenshots into Appellant's April 8, 2019 statement to Reavis to create Appellant's "wrongful act".

Reavis testified on April 8, 2019 he met Appellant at Appellant's home, 1704 Hutchings, Longview, Texas. 3-RR-12-13. Reavis asked Appellant if Hutlzelman lived at 1704 Hutchings. 3-RR-13. Reavis testified Appellant responded by stating, "No, that they had busted up, and he had no idea where she was at." 3-RR-13. Reavis said he pressed Appellant further and felt Appellant was being elusive. 3-RR-13. Reavis asked Appellant, "if you were going to find her where would you look?". 3-RR-13. Reavis testified Appellant said, "Well, I know she's from Ohio, or she's got family," and Reavis cut off Appellant's statement at that point. 3-RR-13. Reavis testified Appellant was not real cooperative, so he left the house. 3-RR-13. It is this statement the appellate court relied upon as the wrongful act to procure Hutlzleman's unavailability at trial.

However, Reavis served Hutzleman a subpoena four days later, April 12, 2019. CR-17-19. Hutzleman was located at 1704 Hutchings. 3-RR-14. A point of contention for the State of Texas and the appellate court. However, there is no testimony or evidence concerning any interaction between Appellant and Hutzleman. Reavis went to the house on April 12, 2019 because he knew Appellant was not there. Id. After the alleged misconduct by Appellant, Reavis was still able to serve Hutzelman her subpoena. There is no indication Appellant did anything after April 8, 2019 to keep Hutzleman from testifying. In fact, Reavis testified he never saw Appellant and Hutzleman together or interact in anyway. 3-RR-43.

Appellant did nothing to stand in the way of Hutzleman being subpoenaed, and she was served a subpoena. There is nothing in the record indicating threats by Appellant or overt acts to procure Hutzleman's unavailability at trial. Appellant spoke to the investigator on April 8, 2019 indicating he did not know where Hutzleman could be located. Four days later the State located Hutzleman and served her with a subpoena. Three days later she did not show up to testify.

The appellate court's reading of the statute broadens the plain language to include non-action or inaction by Appellant to count for the wrongful procurement of the unavailability of a witness. It allows the trial court to imagine, not infer, some malfeasance on behalf of Appellant that in any other setting would not be conjured. This interpretation not only violates settled rules of statutory construction, it conflicts with established precedent.

The Court of Appeals has rendered the "wrongfully procure" requirement meaningless, because under its construction, simply showing the witness's absence is enough to show "wrongful procurement" of said absence. The appellate court's application of this statute eliminates the need for the State to prove by a preponderance of evidence that Appellant acted wrongfully thus causing the witness's unavailability allowing the State to show the "wrongfulness" simply by the witness' absence. No state appellate court, this Court or the United States Supreme Court has taken the doctrine this far. By allowing inaction to qualify as a wrongful act Appellant's Sixth Amendment right to confront his accuser was violated.

GROUND FOR REVIEW 2.

THE COURT OF APPEALS ERRED WHEN IT HELD THE WITNESS WAS UNAVAILABLE TO TESTIFY EVEN THOUGH SHE HAD BEEN SERVED WITH A SUBPOENA AND THE STATE OF TEXAS MADE NO FURTHER EFFORT TO SECURE HER APPEARANCE.

ARGUMENTS AND AUTHORITIES UNDER GROUND TWO

A party to a criminal case who wrongfully procures the *unavailability* of a witness or prospective witness may not benefit from that witness's absence if their wrongdoing procured such absence. [Emphasis added] TEX. CODE CRIM. PROC., Art. 38.49(a). Because the right to confrontation is an essential and fundamental requirement for a constitutionally fair trial, prosecutorial authorities must make a good-faith effort to obtain a witness's presence at trial. *Barber v. Page*, 390 U.S. 719, 722, 724-725 (1965); Citing *Pointer v. Texas*, 380 U.S. 400, 405 (1965). After all, the right to confrontation is a trial right that "includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* at 725. Just because the State thinks a witness may refuse or rebuke its request does not alleviate the need to make the inquiry, search and effort to bring the witness to trial. *See Id.* at 724.

Good faith does not require the State to engage in futile acts when there is no possibility of procuring a witness, like for example an intervening death. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) [overturned by *Crawford* on other grounds]. However, even if remote, if there is a possibility that some measures may produce the declarant then good faith may require the State to at least try within reason. *Id.* Citing *California v. Green*, 399 U.S. 149, 189 n. 22 (1970). Texas courts have fallen in line with the United States Supreme Court.

In *Whitehead v. State*, 450 S.W.2d 72 (Tex. Crim. App. 1969), this Court restated the rule from *Barber v. Page*, prosecutorial authorities must show a good faith effort to produce a witness before claiming the witness is unavailable. *Whitehead* at 74. The United States Supreme Court and this Court dismissed the idea that mere absence from the jurisdiction qualifies as unavailability for confrontation purposes. *Id.* Citing Wigmore, Evidence, § 1404 (3d ed 1940). Texas' appellate courts have fleshed out the good faith requirement even further. To protect the Sixth Amendment "the State must show serious efforts to locate and produce the witness" before

introducing prior out of court testimonial statements. *Reyes v. State*, 845 S.W.2d 328, 331 (Tex. App.-El Paso 1992). Absenteeism does not equate to unavailability; it is not until the State has shown a good faith effort to obtain the witness's presence can the Constitutional exception be granted. *Ledbetter v. State*, 49 S.W.3d 588, 592 (Tex. App.-Amarillo 2001), *Reed v. State*, 312 S.W.3d 682, 685 (Tex. App.-Houston 2010).

In *Barber* the State failed to procure the appearance of a witness who was in the federal penitentiary just over 200 miles away from the trial setting. *Barber* at 722. The State made no effort to bring the witness to testify. They did not issue a subpoena. They did not speak to prison officials to schedule a transport. The State simply relied on the fact that the witness was no longer in the court's jurisdiction and believed that to be enough to qualify the declarant as unavailable. The *Barber* Court said this did not meet the good-faith standard required to prove unavailability. *Barber* at 724. In *Ohio v. Roberts* the State managed to prove good faith.

In *Ohio v. Roberts* the State sought to have Anita's testimony from a prior hearing read to the jury. *Ohio v. Roberts* at 56. To prove Anita's unavailability the State had Anita's mother testify that Anita had been gone for approximately eight months and she was traveling out of state, but no one knew her whereabouts or how to reach her. *Id.* at 59. The State sent five subpoenas to Anita's last known address, none of which were answered. *Id.* The Court reasoned the mother's testimony coupled with the State's subpoena efforts reached the level of good-faith qualifying Anita as unavailable for confrontation clause considerations. *Id.* at 75. The Texas Courts have found good faith on similar grounds.

This Court reasoned in *Whitehead* that simply having another witness testify the absent witness is in another State is not sufficient to show good faith in procuring the witness to testify. *See Whitehead* at 74-75. Like *Barber* the State relied on the concept that because the witness

was absent from the jurisdiction the witness was unavailable. *Id.* at 74. However, this Court ruled that simply finding out where the declarant may be without trying to bring the witness to the trial does not qualify as good faith effort. *Id.* at 75. The appellate courts have taken the concept even further.

Juxtaposing the facts and holdings in *Reed* and *Reyes* bring to light what must be done to prove good faith in procuring a witness's appearance. In *Reed* the victim-witness, Stewart, missed multiple appointments with Investigator Jones, but eventually he was able to get a statement from her prior to the first trial. *Reed* at 684. Jones had to arrest Stewart on a warrant to secure her appearance at the first trial. *Id.* Jones lost contact with Stewart after the first trial, but he was eventually able to serve her with a subpoena and the trial judge admonished Stewart when to return. *Id.* Prior to the second trial Stewart left Jones a voicemail saying she was scared to testify due to being threatened. *Id.* Jones asked law enforcement in Fort Bend County to help locate Stewart. *Id.* Jones spoke to Stewart's family members; none knew where to locate her. *Id.* Because Jones tried multiple times to contact Stewart, was told by Stewart she was scared to testify, requested the help of other agencies and exhausted all familial contacts, requesting a writ of attachment would have been futile. Jones made a good-faith effort to procure Stewart's appearance. *Id.* at 685-686.

In *Reyes* the investigator started his hunt only three days prior to trial. *Reyes* at 330. After learning the witness might have been in Juarez, Mexico, the investigator asked for the witness's grandmother to assist in tracking him down. *Id.* The grandmother testified neither she nor another grandson could locate the witness. *Id.* at 331. The State did nothing else to procure the witness's appearance at trial. *Id.* The court held the State did not meet its burden of

reasonable good faith to make the witness available to testify. *Id.* The Amarillo Court's ruling in *Ledbetter* falls in line with *Reed* and *Reyes.*

The State needed Officer LeHew's testimony to prove Its case in *Ledbetter*. After the first trial ended with a hung jury LeHew was served a subpoena more than three weeks prior to the second trial setting. *Ledbetter* at 594. Several weeks before trial the prosecutor informed LeHew his presence and testimony would be needed. *Id.* The State had Deputy Sheriff Bockman testify LeHew was in Dallas in search of a new job and he did not know if LeHew would return. *Id.* Bockman said LeHew had been in Dallas for at least two weeks. *Id.* at 591. Although the State did not do as much as it did in *Reed*, It went beyond Its efforts in *Reyes*. And although the State did not request a writ of attachment, this was only one factor to be considered in the good-faith analysis. *Id.* at 594.

In the instant case the appellate court determined Hutzleman's absence on Monday April 15, 2019 was enough to qualify her as "unavailable" for purposes of invoking the forfeiture by wrongdoing statute, Texas Code of Criminal Procedure Section 38.49.

Forfeiture by wrongdoing requires two elements, the witness is unavailable to testify and the reason for said unavailability is directly linked to some act of wrongdoing by the Appellant. The Court of Appeals expanded the forfeiture by wrongdoing doctrine allowing its application when the record does not show the witness to be unavailable. The appellate court conflated absenteeism with unavailability. This interpretation is not faithful to the plain language of art. 38.49(1), requiring the State to show a reasonable good-faith effort to procure the witness's appearance at trial. The appellate court's ruling conflicts with this Court's ruling in *Whitehead*, the United States Supreme Court's rulings in *Barber* and *Ohio* and the lower appellate court rulings in *Reed, Reyes* and *Ledbetter*.

On April 12, 2019 District Attorney Investigator, Hall Reavis, served Lorie Hutzleman with a subpoena to appear in court the following Monday, April 15, 2019. See CR-17-19. The trial court followed customary procedures in Gregg County, picking a jury on Monday morning and starting the State's case in chief Tuesday giving the State of Texas an opportunity to seek out a difficult witness who did not show prior to jury selection. The record is silent concerning the State's actions to procure Hutzleman's appearance past serving Hutzleman with a subpoena on April 12, 2019, three days prior to jury selection. The State knew Hutzleman was a difficult witness, but that does not excuse the requirement to produce her at trial. The State did not request a writ of attachment, go back to the address where they served her, attempt to speak to family or friends or enlist the aid of the Special Investigations and Apprehensions Unit which has been called upon many times in the past when searching for unruly witnesses. The State, as in *Barber, Whitehead* and *Reyes* failed to make a good-faith effort to procure Hutzleman's availability at trial. The State didn't simply lack serious efforts as *Reyes* calls one to do, It lacked any efforts to bring Hutzleman to trial and in so doing violated Appellant's constitutional guarantee to confrontation. After all, if there is a possibility, even if remote, that affirmative measures might produce the declarant, the obligation of good faith should demand their effectuation. *Ohio v. Roberts* at 74. Here the State took no affirmative measures.

CONCLUSION

The appellate court's affirmation of the Forfeiture by Wrongdoing Doctrine violated Appellant's Sixth Amendment right to confront his accusers. Under the instant facts the appellate court's ruling that Appellant acted wrongfully violates the plain language of the statute, conflicts with other Texas appellate court rulings, this Court's rulings and the United States Supreme Court's rulings. Appellant made one statement four days prior to the witness being

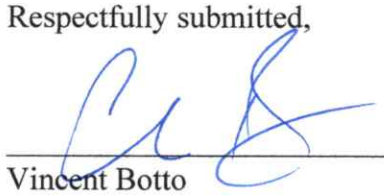
served with a subpoena. This cannot be the statute's intended meaning or the way of the precedent.

Additionally, the State failed to show that It made a good faith effort to procure the witness's availability at trial. Without a showing of good faith, the State cannot claim the witness to be unavailable. Because the State failed to act in good faith and the appellate court refused to address the issue of availability, Appellant's Sixth Amendment right to confront his accuser was violated.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays this his conviction and sentence be reversed, and the cause be remanded for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify, by affixing my signature above, that a true and correct copy of the foregoing Appellant's Brief on the Merits, was mailed through the U.S. Postal Service to Brendan Guy, Office of the Gregg County Criminal District Attorney, 101 E. Methvin St. Longview, Texas 75601, and was mailed through the U.S. Postal Service to Stacey Soule, State Prosecuting Attorney, P.O. Box 13046 Capitol Station, Austin, Texas 78711-3046, on this day, April 6, 2020.

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Appellant's Brief on the Merits contains 6,350 words.

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